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OFFICE OF PETITIONS

In re Application of :
Ritchie et al. :
Application No. 09/023,259 : ON PETITION
Filed: 13 February, 1998 :
Attorney Dckt No. 101102-0002 :

This is a decision on the petition filed 20 May, 2004, under 37 CFR 1.137(a)¹ to revive the above-identified application which is first treated as a petition to withdraw the holding of abandonment, and in the alternative as a renewed petition under 37 CFR 1.137(b).

The petition under 37 CFR 1.137(a) is dismissed.

The petition under 37 CFR 1.137(b) is granted.

The application became abandoned on 7 September, 2000, for failure to timely reply to the final Office action mailed on 6 June, 2000, which set a three (3) month shortened statutory period for reply. No extensions of the time for reply in accordance with 37 CFR 1.136(a) were obtained. Notice of

¹A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(1);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

Abandonment was mailed on 14 December, 2000. A petition under 37 CFR 1.137(b) was filed on 12 January, 2001, but was dismissed on 11 May, 2001. The renewed petition filed on 11 July, 2001 was dismissed on 23 July, 2001.

Petitioners assert that the Decision on Petition mailed on 23 July, 2001, was never received. Petitioners further assert that they believe that the Decision mailed on 23 July, 2001, may not have been mailed to petitioner's current correspondence address, but rather to an old address.

PETITION TO WITHDRAW THE HOLDING OF ABANDONMENT

Petitioners assert that the Office action mailed on 23 July, 2001, was never received. A review of the record indicates no irregularity in the mailing of the Office action, and in the absence of any irregularity in the mailing, there is a strong presumption that the Office action was properly mailed to the address of record. This presumption may be overcome by a showing that the Office action was not in fact received. The showing required to establish the failure to receive an Office action must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.² The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g. if the practitioner has a history of not receiving Office actions).

The showing of record is insufficient to warrant withdrawal of the holding of abandonment. A review of the record reveals that the decision mailed on 23 July, 2001, was mailed to petitioners' address at 88 Black Falcon Avenue, Boston, MA 02210. A copy of the decision mailed 23 July, 2001, is enclosed for petitioners' reference.

Furthermore, petitioners have not presented a copy of the docket record where the non-received Office communication would have

²M.P.E.P. § 711.03(c); See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

been entered had it been received and docketed. Additionally a statement from the practitioner stating that a search of the file jacket and docket records indicates that the Office communication in question was not received has not been provided. As the required showing has not been presented, the petition must be dismissed.

PETITION UNDER 37 CFR 1.137(a)

The Commissioner may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to be "unavoidable".³ Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.⁴

The showing of record is inadequate to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).⁵

³35 U.S.C. § 133.

⁴In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

⁵See MPEP 711(c) (III) (C) (2) for a discussion of the requirements for a showing of unavoidable delay.

Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, facsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.⁶

As petitioners have provided no showing of evidence to satisfy the requirements of a grantable petition under 37 CFR 1.137(a), the petition will be dismissed.

PETITION UNDER 37 CFR 1.137(B)

In light of the showing presented in the present petition and the prior payment of the petition fee required under 37 CFR 1.137(b), the petition is granted. No further petition fee under 37 CFR 1.137(b) is required.

The Office is construing the amendment filed with the present petition as the response required by 37 CFR 1.114. Petitioners must inform the Office if this is not a correct interpretation.

The application is being forwarded to Technology Center 2600 for consideration of the RCE and submission.

Telephone inquiries concerning this matter may be directed to the undersigned at (703)308-6918.



Douglas I. Wood
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Office of Petitions

Encl: Decision mailed on 23 July, 2001

⁶Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).